No. 91-198

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARRIS TRUST AND SAVINGS BANK, an Illinois banking corporation, not individually but as Trustee; and LASALLE NATIONAL BANK, a national banking association, not individually but as Trustee,

Petitioners,

VS.

E-II HOLDINGS, INC. and AMERICAN BRANDS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN BRANDS, INC.

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QUESTIONS PRESENTED

1. Should *certiorari* be granted where all but one of the claims for declaratory judgment made in the underlying litigation are moot and the only remaining claim presents an issue of state contract law?

2. Should *certiorari* be granted so that this Court may review whether the Court of Appeals correctly held that a party seeking declaratory relief fails to state a case or controversy where it refuses to take a position or express any view as to the merits of the matters allegedly "in dispute," where the Court of Appeals found decisive and followed this Court's decision in *Princeton University* v. *Schmid*, 455 U.S. 100 (1982)?

3. Should *certiorari* be granted so that this Court may review whether the Court of Appeals correctly applied New York state law when it held that the implied covenant of good faith and fair dealing recognized under that law may not be invoked by a party to an existing contract to create a new, substantive and unbargained-for contractual term which is inconsistent with the existing terms of the contract?

PARTIES TO THE PROCEEDING

The parties to the proceedings below all appear in the caption of this case. Pursuant to Rule 29.1 of this Court, American Brands, Inc. states that it has no parent company and that the following are subsidiaries or affiliates of American Brands, Inc. which are not wholly owned:

ACCO International (N.Z.) Limited
ACCO Jamaica Limited
ACCO Mexicana S.A. de C.V.
Griplight Limited
Office Products International (W.A.) Pty. Ltd.
C.A. ACCO Manufacturing
Acushnet (Thailand) Limited
Acushnet Foot-Joy (Thailand) Limited
Titleist Japan, Inc.
Artesania Espanola de Optica S.L.
Delta Optik AG
Donal MacNally Opticians Limited
Filotecnica Salmoiraghi S.p.A.
General Optica S.A.
Konan Keeler Limited
RX Optik AG
Sanmartin Inmeubles S.A.
Lintrend Licensing Company Limited
Microprint Group Limited
Prestige Housewares (India) Limited
The Scotch Whisky Heritage Centre Limited
DICO Holding Company
Flavorpac France S.A.
Hostan Company, Ltd.

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BRIEF IN OPPOSITION OF RESPONDENT AMERICAN BRANDS, INC.

I.

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Respondent, American Brands, Inc. ("American"), respectfully requests that the Petition for Writ of Certiorari (the "Petition")[1] of Petitioners Harris Trust and Savings Bank ("Harris") and LaSalle National Bank ("LaSalle," and together with Harris,

[1] Citations to the Petition appear herein as "Pet. at __."

the "Trustees") to review the judgment of the United States Court of Appeals for the Seventh Circuit be denied.

Seven of the eight claims for declaratory relief asserted in the Trustees' complaint are not, have never been and will never be justiciable. The Trustees brought the underlying action questioning whether certain transactions engaged in by respondent E-II Holdings Inc. ("E-II") between February and December 1988 were in compliance with the terms of two trust indentures pursuant to which E-II had issued $1.5 billion in high-yield bonds in 1987. When filed, the complaint failed to demonstrate the existence of an actual controversy between the Trustees and E-II and the relief sought was clearly in the nature of an advisory opinion.

Claiming insufficient information regarding the questioned transactions and fearful of litigation, the Trustees asked the District Court to determine for them whether any of the transactions violated the indentures. Without such relief, they claimed, they could not know whether a default had occurred and, consequently, whether they owed the bondholders narrow pre-default contractual duties or broader post-default fiduciary duties.

In March 1991, after the Court of Appeals had affirmed the dismissal of the Trustees' complaint for lack of subject matter jurisdiction and failure to state a claim, E-II defaulted in the payment of interest to the holders of the bonds. As a result of this undisputed default, the rights and duties of the Trustees *vis-a-vis* E-II and the bondholders have been firmly fixed; the claims for declaratory relief as to whether there has been a default have been mooted; and the Trustees do not face a threat of injury sufficient to confer standing on them.

Even if the Trustees' declaratory judgment claims were not moot, the Petition should be denied because there are no "special and important reasons" for granting a writ of *certiorari* here. Sup. Ct. R. 10. With respect to the claims seeking declarations as to indenture compliance, the Court of Appeals correctly

applied this Court's decision in *Princeton University* v. *Schmid*, 455 U.S. 100 (1982) (*per curiam*), to the facts of this case when it held that the Trustees failed to present an actual case or controversy, inasmuch as they refused to take any position as to whether any of the questioned transactions actually violated the indentures. The Trustees point to no conflict between the decision of the Court of Appeals and that of any other United States Court of Appeals on the same matter, and no conflict with any state court of last resort on any federal question. Moreover, the decision below did not decide an important issue of federal law unsettled by this Court or in a manner conflicting with any other applicable decisions of this Court.

With respect to the sole claim of the Trustees found below to have presented a case or controversy – their alleged entitlement to information from E-II about the transactions beyond that required to be furnished under the terms of the indentures – the Court of Appeals correctly held that the Trustees had failed to state a claim for relief under applicable New York State contract law. This Court does not ordinarily sit to review claimed errors of state common law.

A. THE TRANSACTIONS "IN DISPUTE" AND THE NATURE OF THE ACTION

The Statement of the Case presented in the Petition contains several misstatements of the facts of this case and of the holdings of the courts below. Rather than restate the facts of the 14 separate corporate transactions underlying the litigation, American adopts and incorporates herein the statement of facts contained in the District Court's opinion which is reprinted at pages A-20 through A-38 of Petitioners' Appendix (cited hereafter as "PA __").[2]

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[2] Among other things, the Trustees incorrectly state that the opinions of counsel and the opinion of E-II's investment banker provided to them on June 22, 1988, did not cover the March 31, 1988, and April 15, 1988, sales by E-II of its Day-Timers and Vogel Peterson subsidiaries to American. These opinions,

(Footnote continued)

B. BASES FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The statement of the bases for federal jurisdiction in the District Court appearing in the Petition is neither complete nor correct. For purposes of their motion to dismiss, E-II and American assumed, *arguendo*, that a private right of action exists under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa *et seq.* (the "TIA"). Based upon that assumption, the District Court would have had federal question jurisdiction over the action pursuant to 28 U.S.C. § 1331, as the claims asserted are allegedly based upon Section 322 of the TIA, 15 U.S.C. § 77vvv, in that this is an action purportedly to, *inter alia*, effectuate the purpose of the TIA, including but not limited to Sections 314 and 315 thereof, 15 U.S.C. §§ 77nnn, 77ooo. E-II and American have reserved the right to contest the existence of a private right of action under the TIA. The Court of Appeals did not address this question. (PA 5 n.7.) American does not now agree that the District Court had federal question jurisdiction under 28 U.S.C. § 1331.

The District Court otherwise had jurisdiction pursuant to 28 U.S.C. § 1332, in that there exists complete diversity between the parties and the amount claimed to be in issue exceeds $50,000, exclusive of interest and costs.

C. THE DECISIONS BELOW

1. *The District Court Decision*

Relying in part on the Court of Appeals' decision in *Illinois ex rel. Barra* v. *Archer Daniels Midland Co.*, 704 F.2d 935 (7th

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which were provided to the Trustees despite the fact that their delivery was not required by the terms of the indentures, did in fact cover those sales. (PA 31-32.) Copies of the opinions delivered to Harris are appended hereto as Respondent's Appendix 1. The same opinions were simultaneously provided to LaSalle.

With respect to the Trustees' claim that information has been withheld from them, it should also be noted that the Trustees have refused certain information proffered by E-II, claiming their fiduciary duties precluded receipt of information on a confidential basis (PA 3 n.5; PA 35), and that the Trustees now state that E-II is at this time providing information to certain unidentified bondholders (Pet. at 9 n.8).

Cir. 1983) ("*Archer Daniels*"), the District Court held that it was without "subject matter jurisdiction to advise the Trustees whether the various acquisitions and transactions were in compliance with the terms of the Note Indentures" (PA 43), finding that no "controversy" existed and that "neither the Trustees nor the Note Holders have as yet alleged any injury and instead are proceeding in the realm of conjecture and hypothesis" (PA 42-43). The District Court concluded that the complaint asked for nothing more than an advisory opinion, stating (PA 42):

> "Comparing the facts here as alleged by Trustees in their complaint and the facts in *Archer-Daniels-Midland* appears to foreclose the relief sought by the Trustees with respect to whether E-II violated the Indentures creating an 'Event of Default.' For a variety of reasons, including lack of information and lack of sufficient Holder participation, Trustees have declined to declare an event of default under the terms of the Indentures. Even if this court should conduct the lengthy evidentiary hearings necessary for it to make an independent determination that an event of default had in fact occurred with regard to one or more of the transactions, so as to empower the Trustees to act, the Indentures do not require them to act. Under Section 7.05, in the event of a default other than payment of principal, Trustees may withhold the notice if the Trustees determine withholding is in the interest of the security Holders. Even if the Trustees did act, under Sections 6.04 of the Indentures, the security Holders holding a majority of the principal amount of indebtedness have the power to overrule the Trustees. Therefore any opinion that the court might issue could be nothing more than an advisory opinion, advising Trustees of their rights but not resolving any actual case or controversy. *Archer-Daniels-Midland* at p. 941. The Trustees, in effect, at all times have the power to create a controversy but they have not yet done so nor do they have to do so."

With regard to the Trustees' request for a declaration concerning their entitlement to information beyond that specified in the indentures, the District Court observed that "[a]rguably an actual dispute may exist over Trustees' rights to additional information" (PA 44) (footnote omitted), and in view of such probable jurisdiction, proceeded to resolve that claim on the merits. In its opinion, the District Court noted that the "Trustees admit that there is no specific provision in the Indentures entitling them to the information they request" (PA 45), found that "neither the Indentures nor the TIA appears to require [E-II] to furnish information not specifically provided for in the Indentures themselves" (PA 45), and held that "absent any specific requirement in the Indentures, E-II is under no obligation under New York law, the TIA or rules and regulations issued under authority of the TIA to furnish information on its acquisition or transactions other than the certificates and opinions expressly provided for" (PA 46). Accordingly, to the extent that it had jurisdiction to entertain the Trustees' complaint, the District Court held that the complaint failed to state a claim upon which relief can be granted (PA 46).[3]

2. *The Court Of Appeals' Decision*

On appeal the Trustees continued to argue that it is "neither necessary nor appropriate for them to commit to a position," asserting instead that their "request for 'judicial guidance' and

[3] Thereafter, the Trustees moved, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, for an order amending or modifying the judgment. (Cir. App. at 0046) (citations in this form refer to the Appellants' Appendix filed with the Court of Appeals). The motion was limited to that portion of the complaint which sought a declaration regarding their entitlement to additional information from E-II. (Cir. App. at 0914.) Contrary to the admission contained in their complaint (Cir. App. at 0063; 0268), the Trustees maintained in their post-judgment motion that the express terms of the indentures entitled them to the information sought, citing Section 11.05(4) thereof (Cir. App. at 0914). The District Court rejected this new argument, holding that by its express terms Section 11.05 is limited to an "opinion" and "certificate," and nowhere in that section "is there any requirement that the facts underlying the opinion or certificate be disclosed." (Cir. App. at 0914-15.) The District Court also rejected the Trustees' claim that, under New York law, they had an "implied" right to such information. (Cir. App. at 0915-16.)

'judicial instruction' is the paradigm on which all declaratory judgment cases are built." (PA 6.)

Relying upon this Court's decision in *Schmid*, 455 U.S. at 102, the Court of Appeals held that the Trustees' refusal to express an opinion on the merits of the questions raised by them evidences the lack of an actual controversy as to indenture compliance. (PA 7-8.) The court rejected the Trustees' claim that the positions taken by a minority of the bondholders that a default had occurred somehow satisfied the case or controversy requirement as to them. The court held that the Declaratory Judgment Act requires the existence of an "actual controversy," 28 U.S.C. § 2201(a), a predicate which has as its "unspoken, but yet obvious, corollary. . . that the dispute must exist *between the parties to the declaratory judgment action*." (PA 6-7 (emphasis in original), *citing Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 242 (1937).)[4]

Like the District Court, the Court of Appeals found that the only issue as to which there was a possible case or controversy was the Trustees' claim that they are entitled to more information. (PA 10.) And, like the District Court before it, the Court of Appeals found that, under applicable New York state law, neither the express language of the indentures[5] nor the implied covenant of good faith and fair dealing granted the Trustees any right to the information they had demanded. (PA 12-16.) With respect to the implied covenant of good faith, the court applied existing New York precedents[6] and held that the implied covenant

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[4] The court also found the complaint "troublesome" for two additional reasons: (1) it failed to allege any injury sustained by the Trustees or the bondholders sufficient to demonstrate that they had standing to seek declaratory relief, and (2) that at least one of the requests was "premised on pure speculation as to what the future might hold, is akin to a hypothetical question asked by a law school professor; [and] it does not raise issues that are ripe for judicial determination." (PA 8 n.14.)

[5] The court considered the Trustees' argument that the express language of the indentures granted them the right to additional information, despite the fact that it found the Trustees had consciously and deliberately waived that argument, only to raise it tardily on their motion to alter or amend the judgment. (PA 11.)

[6] *See infra* at n.15.

may be invoked by a court only to prevent a party to a contract, who has violated the spirit but not the letter of the contract, from depriving the other party of a mutually contemplated benefit of the contract; and not to create an additional, substantive and unbargained-for right.[7] (PA 13-15.) Finally, the court affirmed the District Court finding that the TIA imposed no obligation on E-II to provide the additional information demanded, stating that the TIA's "freedom-of-contract mentality leaves no room for the interpretation that the Trustees would thrust upon the Act." (PA 17.)

II.

REASONS WHY THE WRIT SHOULD BE DENIED

The Trustees' Petition should be denied. Substantially all of the Trustees' claims have been rendered moot by reason of E-II's March 1991 default. As a result, even if there were "special and important reasons" for granting the writ, this case is a particularly inappropriate vehicle for Supreme Court review. Sup. Ct. R. 10. Moreover, none of the traditional reasons for *certiorari* review is present here. There is no conflict among the circuits. No important and unsettled issue of federal law is presented. In deciding that most of the Trustees' claims failed to present a case or controversy because the Trustees did not take a position with respect to the merits, the Court of Appeals engaged in a straightforward application of this Court's precedents. The only conceivably justiciable issue present – the Trustees' claimed right to information about the transactions at issue beyond that which E-II has already provided – is essentially an issue of New York contract law. The Court of Appeals correctly held that the Trustees had no such right as a matter of New York law, a determination which does not warrant this Court's exercise of *certiorari* review.

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[7] The Trustees blatantly misrepresent the holding of the court below in this regard when they claim that the court held that the implied covenant of good faith and fair dealing applies only to unsophisticated investors. *See* Pet. at 26.

A. E-II's MARCH 1991 PAYMENT DEFAULT HAS MOOTED ALL BUT ONE OF THE TRUSTEES' CLAIMS AND DEPRIVED THE TRUSTEES OF STANDING

1. *The Trustees' Claims For Declaratory Relief As To Whether E-II Is In Compliance With The Indentures Are Moot*

In the Petition, the Trustees concede that since the Court of Appeals rendered its decision "a payment default has occurred, and, as a consequence, it appears that the issue of whether E-II has sufficient remaining assets to ensure repayment of principal and interest on the debt is moot." (Pet. at 9 n.8.) What the Trustees fail to appreciate, however, is that the March 1991 payment default moots not only this one request, but all of their other requests for declarations as to whether or not E-II is in default under the indentures.

"[T]he complaint asks the court to determine whether there has been a default, and to delineate the Trustees' rights." (Pet. at 12.) The Trustees claim to need this determination because it "would have a direct effect on the nature and scope of their duties, as the existence of a default transforms the role of the Trustees from a contractual one to that of a prudent fiduciary." (Pet. at 15.) As a result of E-II's recent failure to pay interest on the bonds, there is no longer any question whether there has been a default or the nature of the Trustees' current rights and duties. No useful purpose can be served by having the federal courts opine as to whether an earlier default existed. As a result, these claims are "classically 'moot.'" *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70-71 (1983) (*per curiam*); *see also Murphy* v. *Hunt*, 455 U.S. 478 (1982) (suspect's constitutional challenge to state statute denying him pre-trial bail held moot once he was convicted, where no claim for bail pending appeal had been made); *Schmid*, 455 U.S. at 103 (university's appeal of state supreme court's ruling invalidating its regulations regarding on-campus solicitations held moot where regulations were substantially amended while case pending on appeal); *Weinstein* v. *Bradford*, 423 U.S. 147 (1975) (challenge to constitutionality of parole procedures held moot once respondent was paroled).

The Trustees claim that they "did not present this definite, concrete dispute to the court to satisfy mere academic curiosity." (Pet. at 15.) Whatever the Trustees' motives for commencing this action, the question *now* is whether the continued pursuit of these claims can be viewed as anything other than an academic exercise. E-II's current default removes any conceivable uncertainty the Trustees might have had as to the nature of their obligations to bondholders or their ability "to pursue remedies against the issuer." (Pet. at 15.) Even were the Trustees to obtain a declaration in this action that any one of the 1988 transactions constituted a default under the indentures, their remedies would be no greater than the remedies available to them today by reason of the March 1991 payment default. Indeed, that these issues are now moot is amply demonstrated by the fact that E-II has not even bothered to file a brief in opposition to the Petition. Because the declarations sought as to whether E-II was in compliance prior to the March 1991 default will not affect the future behavior of any party and will not redress the Trustees' asserted grievances, those claims are moot. *See Iron Arrow Honor Soc'y*, 464 U.S. at 70; *Browning Debenture Holders' Comm.* v. *DASA Corp.*, 524 F.2d 811, 816 (2d Cir. 1975).[8]

The Trustees assert that they can still benefit from having the District Court advise them if they have viable claims for damages against third parties. (Pet. at 9 n.8.) What the Trustees seek now is nothing more than an advisory opinion counseling them as to their most advantageous litigation options and strategies. Before deciding whom to sue and as to which transactions –

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[8] This is not a situation which is "capable of repetition, yet evading review," as there is neither a " 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482, *citing Weinstein*, 423 U.S. at 149. The hypothetical possibility that another indenture trustee may someday find itself desirous of declaratory relief when it is unwilling to take a position with respect to the interpretation of the indentures it has agreed to administer is simply too speculative to save these claims from mootness. *Murphy*, 455 U.S. at 482 ("The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*.").

or even whether to bring suit at all – the Trustees want to be advised as to whether they have any claim worth pursuing. Simply put, the provision of such legal advice is the function of the Trustees' counsel and not the federal judiciary.[9]

2. *The Trustees Do Not Have Standing To Seek Declaratory Relief*

The Court of Appeals also found "troublesome" the Trustees' failure "to allege the injury that the Trustees or investors have sustained or are in immediate danger of sustaining, thereby failing to indicate standing to seek a declaratory judgment." (PA 8 n.14, *citing Vickers* v. *Henry County Sav. & Loan Ass'n*, 827 F.2d 228, 231-32 (7th Cir. 1987).) In the Petition, the Trustees continue to protest (Pet. at 8) that, absent judicial advice, they face "a quandary the likes of Scylla and Charybdis": If they wrongfully declare a default, cross-default provisions in unspecified other credit agreements could cause "the collapse of E-II," resulting in potential liability for the Trustees. (*Id.*) "If, on the other hand, an undetected default did exist, the failure to sue E-II could have resulted in litigation as well." (*Id.*)

The March 1991 payment default has freed the Trustees from their "quandary." E-II is now indisputably in default. Any

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[9] *See Archer Daniels*, 704 F.2d at 941; *Hendrix* v. *Poonai*, 662 F.2d 719, 722 (11th Cir. 1981) (declining to opine on whether proposed action would violate antitrust laws, stating that while "the decisionmakers would benefit greatly by having guidance as to the potential legal ramifications of their decisions . . . such guidance prior to the making of the decision . . . is the role of counsel, not of the courts"); *Fitzgerald* v. *McChesney*, 336 F.2d 905, 910 (D.C. Cir. 1964) (While "[t]he declaratory judgment is a valuable addition to the array of modern judicial remedies, . . . it was never intended as a device for relegating to the courts responsibilities reposed initially in private parties."); *Bellefonte Reinsurance Co.* v. *Aetna Casualty & Sur. Co.*, 590 F. Supp. 187, 193 (S.D.N.Y. 1984) (the requirements of justiciability are not satisfied by a plaintiff who merely alleges that it " 'is at a loss to know what course to pursue' ") (quoting *Duart Mfg. Co., Ltd.* v. *Philad Co.*, 30 F. Supp. 777, 779-80 (D. Del. 1939)); *M & M Transp. Co.* v. *U.S. Industries, Inc.*, 416 F. Supp. 865, 870-71 (S.D.N.Y. 1976).

cataclysmic repercussions of that default have either been visited on E-II or have been stayed by the hand of the Trustees, the bondholders and/or any other creditors of E-II. Under these circumstances, the Trustees are no longer suffering an injury or threat of injury sufficient to confer standing on them to seek declaratory judgment. *See Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); *Vickers*, 827 F.2d at 231-32.

B. THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT THE PETITION

This Court's rules provide that "[a] petition for a writ of *certiorari* will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. None of the traditional reasons for granting *certiorari* is present here.

1. *The Sole Federal Question Presented Has Been Settled By This Court Adversely To Petitioners*

The decision of the Court of Appeals that the Trustees' prayers for declaratory relief regarding indenture compliance failed to present a justiciable case or controversy was based squarely on this Court's decision in *Princeton University* v. *Schmid*, *supra*, 455 U.S. at 102. (PA 7-8.) In that case, the University was an intervening party to a criminal appeal in which the New Jersey Supreme Court had reversed Schmid's criminal trespass conviction on the ground that certain University regulations had violated Schmid's rights of free speech and assembly under the New Jersey Constitution. 455 U.S. at 101. The University appealed to this Court and filed a jurisdictional statement claiming an abridgment of its federal constitutional rights. *Id.* The State of New Jersey did not file a separate jurisdictional statement, but filed a brief stating that it "deem[ed] it neither necessary nor appropriate to express an opinion on the merits of the respective positions of the private parties to this action." *Id.* at 102.

This Court dismissed the University's appeal for lack of jurisdiction because the issue of the validity of the University's

regulations had been mooted by the withdrawal of those regulations during the pendency of Schmid's appeal to the New Jersey Supreme Court. *Id.* The Court concluded, moreover, that the State's presence in the case did not create an independent basis for jurisdiction precisely because the State had failed to take a position on the merits, stating:

> "Had the University not been a party to this case in the New Jersey Supreme Court and had the State filed a jurisdictional statement urging reversal, the existence of a case or controversy — and of jurisdiction in this Court — could not be doubted. *However, if the State were the sole appellant and its jurisdictional statement simply asked for review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy.* We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us. See, *e.g.*, *Sierra Club* v. *Morton*, 405 U.S. 727, 731-732 (1972); *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). Thus the presence of the State of New Jersey in this case does not provide a sound jurisdictional basis for undertaking to decide difficult constitutional issues."

Id. (emphasis added).

In the case at bar, the Trustees are the sole appellants and they have declined to take a position on the merits of the issue whether the questioned transactions gave rise to a default under the indentures. The Court of Appeals thus correctly concluded that no case or controversy exists with respect to the portion of the Trustees' complaint seeking an "advisory opinion" as to whether the questioned transactions give rise to a default.[10] (PA 7-8.)

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[10] The Trustees assert that "[t]he present case does not suffer from any of the substantive infirmities that plagued *Schmid*." (Pet. at 17.) This could not be further from the truth. As demonstrated above, the Trustees are not adverse parties on seven of their eight claims; like the University, they are pressing moot claims; claims which suffer from the same disinterested neutrality evidenced by the State of New Jersey in that case.

2. *No Court of Appeals' Decision Is In Conflict With The Decision Below*

Significantly, the Trustees do not identify a single federal appellate court decision in conflict with the decision below. As the Court of Appeals correctly noted, the Trustees fail to cite a single case directly supporting the proposition that trustees, unlike any other litigant, may sue for declaratory relief in federal court without taking a position on the merits of the underlying issue. (PA 7 n.11.) The absence of any direct conflict among the circuits makes the exercise of *certiorari* jurisdiction inappropriate here. *See Vazquez* v. *United States*, 454 U.S. 975, 976 (1981); *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951); *Wisconsin Elec. Co.* v. *Dumore Co.*, 282 U.S. 813 (1931).[11]

The Trustees criticize the Court of Appeals for even considering whether it had Article III jurisdiction, contending that "[j]urisdictional concerns are no barrier to obtaining judicial instructions in federal court when diversity jurisdiction is alleged" and "[t]hus the Appellate Court's search for a jurisdictional basis need go no further than the law of New York, which specifically authorizes trustee actions for judicial instructions." (Pet. at 21.) What the Trustees fail to comprehend is that state courts are not subject to the "case or controversy" requirement of Article III of the United States Constitution nor the "actual controversy" requirement of the federal Declaratory Judgment Act. It is axiomatic that state law cannot alter or expand the jurisdiction of federal courts. *Watson* v. *Tarpley*, 59 U.S. 517 (1855); *Barrow S.S. Co.* v. *Kane*, 170 U.S. 100 (1898).[12]

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[11] The Trustees implicitly concede the complete lack of support for their position, by relying on cases which they admit "do not specify whether a position was taken in the pleadings." (Pet. at 24 n.16.)

[12] This argument also completely ignores the well-settled principle that questions of procedure relating to actions brought in the federal court system are governed by federal law. *Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937) (operation of the Declaratory Judgment Act is procedural).

(Footnote continued)

3. *Trustees' Petition Does Not Present An Important Question Of Federal Law*

The Trustees' Petition does not present to the Court an unsettled, important question of federal law. Rather, as demonstrated above, to the extent that any federal issue is presented by the Petition, this Court's decision in *Schmid* is dispositive.

Unsatisfied with the Court of Appeals' decision, the Trustees complain that "[b]y grafting the artificial and constitutionally unnecessary condition that trustees 'take a position' onto the case or controversy requirement, the Appellate Court has rendered the Declaratory Judgment Act incapable of performing its intended function. . . ." (Pet. at 13.) To the contrary, the "actual controversy" requirement of the Declaratory Judgment Act is neither "artificial" nor "unnecessary;" it "is a jurisdictional prerequisite of constitutional dimension." *Grafon Corp.* v. *Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979). In effect, what the Trustees seek is an exemption, applicable only to indenture trustees, from the ordinary application of a statutory and constitutional requirement. Such an exemption would be wholly unprecedented and unwarranted.

To the extent that the Trustees claim the ruling below will place other trustees in a similar "quandary the likes of Scylla and Charybdis," that quandary is no different from that of most other litigants who must choose whether or not to commence litigation on the basis of less than perfect information.[13] In any event, given E-II's March 1991 payment default and the ensuing negotiations, the Trustees and the bondholders whose interests they represent may well be in a better position to obtain the information they desire from E-II now than they were

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Moreover, since the Trustees failed to raise this argument in either the District Court or the Court of Appeals, it is not properly before this Court for consideration. *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).

[13] The nature of the Trustees' "quandary" is vastly overstated. The Court of Appeals specifically stated that its holding should not be interpreted as requiring the Trustees to issue a Notice of Default before their claims will be justiciable. (PA 9 n.16.)

previously. (*See* Pet. at 9 n.8. (acknowledging that E-II has been voluntarily sharing information with "certain large holders" of its bonds).) Should the Trustees ultimately obtain information, whether from E-II or other sources, substantiating any of the minority bondholders' claims, they can then take appropriate action.

4. *The Trustees' Claimed Errors Of State Law Do Not Constitute An Appropriate Subject For This Court's Review*

The Court of Appeals held that, as a matter of New York law, the Trustees lacked any contractual right to information beyond the Officers' Certificates and Opinions of Counsel specifically required by the indentures and furnished by E-II. The Trustees argue that the ruling of the Court of Appeals "misinterprets" New York law and that the "implied covenant of good faith and fair dealing" entitled the Trustees to the additional information they sought. (Pet. at 26.)[14] American respectfully submits that, even if this assertion were true, which it is not, the Trustees' challenge to the Court of Appeals' determination of an issue of state contract law is not a matter of sufficient import to warrant a grant of *certiorari* jurisdiction. *See Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review.").

This challenge is particularly inadequate in the instant case where the decision below is completely consistent with the body

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[14] Before the Court of Appeals the Trustees also argued that the express terms of the indentures granted them the right to the additional information they had demanded. The court held that this argument had been consciously and deliberately waived (PA 11), before going on to state that were it to reach the issue it would "feel compelled to agree with the district court" and find against the Trustees as this argument was "more wishful thinking than anything else" (PA 12). Prudently, the Trustees do not reassert this argument in the Petition.

Similarly, the Trustees do not challenge the Court of Appeals' holding that the TIA does not afford them a right to the additional information they seek. The argument has thus been waived. Sup. Ct. R. 14.1(a).

of New York law rejecting efforts by bondholders and indenture trustees to use the implied covenant of good faith and fair dealing to impose on an issuer new, substantive and unbargained-for obligations inconsistent with the terms of the indenture.[15]

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[15] *See Broad* v. *Rockwell Int'l Corp.*, 642 F.2d 929 (5th Cir. 1981), *cert. denied*, 454 U.S. 965 (1981); *Hartford Fire Ins. Co.* v. *Federated Dep't Stores, Inc.*, 723 F. Supp. 976 (S.D.N.Y. 1989); *Metropolitan Life Ins. Co.* v. *RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1519 (S.D.N.Y. 1989) ("These plaintiffs do not invoke an implied covenant of good faith to protect a legitimate, mutually contemplated benefit of the indentures; rather, they seek to have this Court create an additional benefit for which they did not bargain."); *see also Don King Prods., Inc.* v. *Douglas*, 742 F. Supp. 741, 767 (S.D.N.Y. 1990) ("The implied covenant does not operate to create new contractual rights."); *Rowe* v. *Great Atl. & Pac. Tea Co., Inc.*, 46 N.Y.2d 62, 412 N.Y.S.2d 827, 385 N.E.2d 566 (1978); *Havel* v. *Kelsey-Hayes Co.*, 83 A.D.2d 380, 445 N.Y.S.2d 333 (4th Dep't 1981); *cf. Van Gemert* v. *Boeing Co.*, 520 F.2d 1373 (2d Cir. 1975), *cert. denied*, 423 U.S. 947 (1975) (invoking implied covenant to prevent deprivation of "bargained-for" rights).

CONCLUSION

For the reasons stated above, Respondent, American Brands, Inc., respectfully requests that the Trustees' Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Dated: September 3, 1991

Respectfully submitted,

DANIEL J. O'NEILL
(Counsel of Record)
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TRINI L. DONATO
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RESPONDENT'S APPENDIX 1

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E-II HOLDINGS INC.

June 22, 1988

Ms. Carolyn Potter
Assistant Vice President
Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60690

Dear Ms. Potter:

This is in response to your letter of June 15, 1988 in which you request an opinion of counsel and certain other information regarding the sale by American Brands, Inc. ("American") of the stock of E-II Holdings Inc. ("E-II") to a subsidiary of Riklis Family Corporation and the sales to be made by E-II to American of certain E-II subsidiaries.

In accordance with your request, the following is a description of the transactions. American entered into a Stock Sale Agreement on June 12, 1988 whereby it agreed to sell all the stock of E-II to McGregor Acquisition Corp., a subsidiary of privately held Riklis Family Corporation. Riklis Family Corporation also owns McCrory Stores and Faberge/Elizabeth Arden. American will purchase from E-II the following companies: Aristokraft, Inc., Waterloo Industries, Inc. and Twentieth Century Companies, Inc. American has already purchased Day-Timers, Inc. and Vogel Peterson Company from E-II. In addition, American will also acquire from E-II two other operations – The Stiffel Company and Aunt Nellie's Farm Kitchens, Inc. – the resale of both of which it is presently negotiating. The purchase price for the five companies being retained by American is $645 million.

McGregor Acquisition Corp. will pay approximately $950 million in cash, subject to closing adjustment, plus $250 million face amount of preferred stock. The $1.5 billion in subordinated

debt, including the Notes covered by the Indenture, will remain with E-II. The companies being retained by E-II include Culligan International Company, Samsonite Corporation, Samsonite Furniture Co., Home Fashions, Inc., Beatreme Food Ingredients, Inc., Frozen Specialties, Inc., Lowrey's Meat Specialties, Inc., Martha White Foods, Inc. and Pet Specialties, Inc. The sale is subject to compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Let me assure you that the transactions, including the planned sales of certain E-II subsidiaries to American, will be in full compliance with the Indenture. While it should not be assumed that the prior sales by E-II of Day-Timers, Inc. and Vogel Peterson Company to subsidiaries of American were necessarily transactions related to the planned sales, such prior sales were in full compliance with the Indenture. In accordance with your request, we are enclosing an opinion of counsel covering the proposed transactions and prior sales. We note, however, that the Indenture does not require the delivery of such an opinion.

Please note that E-II was formed as an entity which would be engaged in the business of making acquisitions and divestitures. The sales of the E-II subsidiaries to American is in keeping with its announced business purpose. The Prospectus dated July 2, 1987 for the issuance of the Notes provides:

> "[E-II] is a newly formed holding company that will manage a portfolio of businesses and will seek to enhance its value through leveraged acquisitions, improved management of operations, selective dispositions and corporate restructurings."
>
> • • •
>
> "Management of the Company expects to devote substantial time and resources to analyzing the possibility of investing in additional businesses, making and monitoring investments in publicly-owned companies, acquiring companies, rationalizing the operations of acquired businesses with those of the

Company's existing businesses and disposing of businesses or parts of businesses as opportunities arise to enhance shareholder value."

* * *

"Management anticipates reviewing the Company's portfolio of companies and investments on a regular basis. Such periodic reviews of the operating performance over time, the need for capital, general market, economic and business conditions, the perceived ability to further improve the operating company, the availability of buyers and values ascribed by the market will be among the factors considered in deciding whether to dispose of a business. When a business is disposed of, the Company may retain an equity interest in it or in the acquiring company. The Company expects to retain cash proceeds from dispositions and use such cash to reduce debt, to make further investment or for other corporate purposes."

* * *

"*Character of Investment.* In view of management's intention to engage in significant purchases and sales of businesses, investors face the risk, in addition to that inherent in the ownership of any security, that the Company might ultimately have a risk profile which differs in material respects from that which it had at the date hereof."

It is intended that the cash received by E-II from the sales of its subsidiaries will be used in the furtherance of its corporate purposes.

We have not enclosed the pro forma financial information that you requested. The furnishing of such information is not required by the Indenture and, given the nature of the sale of E-II and the sales by E-II to American which are covered by

the enclosed opinion of counsel, such financials do not appear to have any relevance to the issues you have raised.

Please note that an annual Officers' Certificate was recently delivered regarding compliance with the Indenture. The proposed transactions are also fully in compliance with the Indenture. We trust that the foregoing and the enclosed opinion will resolve any issues you might have with respect to these matters.

Very truly yours,

/s/D. L. Bauerlein, Jr.
D. L. Bauerlein, Jr.
Vice President and Treasurer

CHADBOURNE & PARKE
30 Rockefeller Plaza
New York, N.Y. 10112

June 22, 1988

Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60690

Attention: Carolyn Potter
Assistant Vice President

Gentlemen:

E-II Holdings Inc. ("E-II") has requested that we render our opinion to you with respect to the announced sale by subsidiaries of E-II to American Brands, Inc. ("American"), a Delaware corporation and currently the sole stockholder of E-II, of the following subsidiaries of E-II: Waterloo Industries, Inc. ("Waterloo"), Aristokraft, Inc. ("Aristokraft"), Twentieth Century Companies, Inc. ("Twentieth Century"), The Stiffel Company ("Stiffel") and Aunt Nellie's Farm Kitchens, Inc. ("Aunt Nellie's") and the sale by American to a subsidiary of Riklis Family Corporation ("RFC"), a Delaware corporation, of all the outstanding stock of E-II. You have also requested that our opinion cover the sale by subsidiaries of E-II to a subsidiary of American of all the outstanding stock of Day-Timers, Inc. ("Day-Timers") and Vogel Peterson Company ("Vogel Peterson"). Waterloo, Aristokraft, Twentieth Century, Stiffel, Aunt Nellie's, Day-Timers and Vogel Peterson are sometimes referred to collectively in this opinion as the "Divested Subsidiaries."

For purposes of this opinion, we have reviewed the provisions of the Indenture dated as of July 1, 1987 between E-II and Harris Trust and Savings Bank as Trustee (the "Indenture") covering E-II's 12.85% Senior Subordinated Notes due 1997 (the "Notes") and, in particular, we have considered Sections 4.02, 4.06 and 5.01 thereof. We have also reviewed the Stock Sale Agreement dated as of June 12, 1988 between American and a Riklis

subsidiary providing for the sale of E-II stock, the audited financial statements of E-II and the Divested Subsidiaries, the recommendation of Morgan Stanley & Co. Incorporated (the financial advisor to E-II with respect to the sales of the Divested Subsidiaries), the resolutions of the boards of directors of E-II and E-II Consumer Products Company, Inc. relating to the March 31, 1988 sale of Day-Timers and the resolutions of the boards of directors of E-II and Samsonite Furniture Co. relating to the April 15, 1988 sale of Vogel Peterson, as well as such other matters as we have deemed relevant for the purpose of rendering our opinion as set forth herein. We have been informed by E-II that Day-Timers and Vogel Peterson have been sold for at least their book value and that the other Divested Subsidiaries will be sold for at least the book value thereof.

Based upon the types of transactions in which American or its subsidiary has acquired or will acquire the Divested Subsidiaries and American will sell the E-II stock to a RFC subsidiary, the nature and amount of assets included in the Divested Subsidiaries and other legal considerations that we deem relevant, it is our opinion that Section 5.01 of the Indenture (which is limited to consolidations, mergers and transfers of all or substantially all of E-II's assets) is not applicable to the sale by American of the E-II stock nor the sale by subsidiaries of E-II of the Divested Subsidiaries. In this connection, we have been advised that the value of the assets of the Divested Subsidiaries is only approximately 25% of E-II's assets. We also have noted the express purpose for E-II's formation, as set forth in its Prospectus dated July 2, 1987 for the Notes, was to acquire, manage and sell a portfolio of businesses, and that Prospectus pointed out that the profile of E-II might ultimately differ from that which existed at the time of the issuance of the Notes.

It is also our opinion that the sale of the Divested Subsidiaries at no less than their book value will be in compliance with Section 4.02 of the Indenture.

It is our further opinion that Section 4.06 of the Indenture (which is limited to maintenance of properties) is not applicable to the past and proposed transactions relating to the Divested

Subsidiaries, all of which involve sales of the stock thereof and, as indicated above, are consistent with the Prospectus disclosure described above. Even if Section 4.06 of the Indenture were held to apply, however, its provisions would be met. We note that the resolutions of the boards of directors of E-II and E-II Consumer Products Company, Inc. adopted on March 30, 1988 provided that the sale of Day-Timers to American was desirable in the conduct of the businesses of E-II and E-II Consumer Products Company, Inc. and was not adverse in any material respect to the holders of the Notes. The resolutions of the boards of directors of E-II and Samsonite Furniture Co., a subsidiary of E-II, for the sale by Samsonite Furniture Co. of Vogel Peterson to a subsidiary of American likewise provided that such sale was desirable in the conduct of the businesses of E-II and Samsonite Furniture Co. and was not adverse in any material respect to the holders of the Notes. Based on the foregoing and other legal considerations that we deem relevant, it is our opinion that, if Section 4.06 of the Indenture were held to be applicable, those sales were in compliance with Section 4.06. While corporate action by E-II and its subsidiaries has not as yet been taken with respect to the sale to American of Waterloo, Aristokraft, Twentieth Century, Stiffel and Aunt Nellie's, we have no reason to believe that the appropriate boards of directors will not make similar determinations in connection with the proposed sales of these companies.

In conclusion, it is our opinion that the sale by American of the E-II stock as contemplated by the Stock Sale Agreement and the purchases by American or its subsidiary of the Divested Subsidiaries have been or will be in compliance with the provisions of the Indenture.

Very truly yours,

/s/Chadbourne & Parke

E-II HOLDINGS INC.

July 1, 1988

Ms. Carolyn Potter
Assistant Vice President
Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60690

Dear Ms. Potter:

This is in response to your letter of June 22, 1988 in which you request additional information regarding sales proposed to be made by E-II Holdings Inc. ("E-II") of certain of its subsidiaries to American Brands, Inc. ("American").

The opinion of counsel, which we sent to you on June 22, 1988, noted that the sales of Waterloo Industries, Inc., Aristokraft, Inc., Twentieth Century Companies, Inc., The Stiffel Company and Aunt Nellie's Farm Kitchens, Inc. will be made at a price at least equal to the book value thereof. This will confirm to you that such sales will be made at a price to be received by E-II considerably in excess of the book value thereof. In addition, the sales of Day-Timers, Inc. and Vogel Peterson Company to a subsidiary of American were also in excess of the book value thereof.

Your assumption that we have consulted with experts on these sales is correct. E-II has consulted with Morgan Stanley & Co. Incorporated with respect to these sales and we enclose at your request a copy of the opinion of Morgan Stanley that the consideration to E-II as a result of these sales is fair to E-II from a financial point of view. This opinion of Morgan Stanley is not publicly available information and we trust that you will treat it in a confidential manner.

Very truly yours,

/s/D.L. Bauerlein, Jr.
D.L. Bauerlein, Jr.
Vice President and Treasurer

MORGAN STANLEY

MORGAN STANLEY & CO.
INCORPORATED
1251 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10020

June 14, 1988

Board of Directors
E-II Holdings Inc.
1700 East Putnam Avenue
Old Greenwich, CT 06870

Dear Sirs:

We understand that E-II Consumer Products Company, Inc. ("Consumer Products"), a subsidiary of E-II Holdings Inc. ("E-II") has sold or intends to sell all of the issued and outstanding shares of AristoKraft, Inc., Vogel Peterson Company, Day-Timers, Inc., Twentieth Century Companies, Inc., Waterloo Industries, Inc. and The Stiffel Company (the "Consumer Disposed Subsidiaries") to American Brands, Inc. or a subsidiary thereof ("American Brands") and, in addition, E-II Food Specialties Company, Inc. ("Food Specialties"), a subsidiary of E-II, intends to sell all of the issued and outstanding shares of Aunt Nellie's Farm Kitchens, Inc. ("Aunt Nellie's") to American Brands. (Collectively, the Consumer Disposed Subsidiaries and Aunt Nellie's are referred to as the "Disposed Subsidiaries"). E-II also has sold or will sell to American Brands or a subsidiary thereof promissory notes owing from certain of the Disposed Subsidiaries to E-II. We further understand that American Brands will pay a total of $693 million in cash at the various closings of the sales of the Disposed Subsidiaries.

You have requested our opinion as to whether the total consideration to be paid to Consumer Products and Food Specialties for the Disposed Subsidiaries is fair to E-II, Consumer Products and Food Specialties from a financial point of view.

In connection with our opinion set forth herein, we have, among other things:

(i) reviewed the financial results for recent years, for interim periods to date and financial projections of the Disposed Subsidiaries, obtained from the management of E-II or from the management of the subsidiary operating entities;

(ii) discussed with certain members of E-II senior management the operating performance of the Disposed Subsidiaries for recent years and for interim periods to date, and the projected financial performance of such entities in the near future;

(iii) analyzed published information regarding certain comparable companies and compared certain financial statistics of the Disposed Subsidiaries with the same statistics of these other companies;

(iv) reviewed the financial terms, to the extent publicly available, of certain comparable acquisitions; and

(v) performed such other analyses and examinations as we have deemed appropriate.

In rendering our opinion, we have assumed and relied upon the accuracy and completeness of all information supplied to us by the managements of E-II and the Disposed Subsidiaries. We have not undertaken any independent verification of any such information.

Based upon the foregoing, we are of the opinion that the total consideration to be paid to Consumer Products for the sale of Consumer Disposed Subsidiaries and to Food Specialties for the sale of Aunt Nellie's is fair to E-II, Consumer Products and Food Specialties from a financial point of view.

Very truly yours,

MORGAN STANLEY & CO. INCORPORATED

By: /s/Joseph G. Fogg, III
Joseph G. Fogg, III
Managing Director